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CASE NO. 93-888

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BRUCE W. JACKSON AND
JEANNETTE JACKSON,
Petitioners

v.

JIM MITCHELL AND JED DAVIS, P.A.
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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2. Jim Mitchell and Jed Davis, P.A. v. Bruce W. Jackson and Jeannette L. Jackson, No. CV-90-449 (Me. Super. Ct., Penob. Cty., March 17, 1991).

JURISDICTION

Respondent asserts that the Supreme Court has no jurisdiction over this matter. The Petitioners failed to raise the Fifth Amendment issue below. Furthermore, the Fifth Amendment is not implicated by this issue Petitioners raise in their argument.

STATEMENT OF THE CASE

Petitioners asserted a legal malpractice crossclaim against Respondent in a foreclosure action commenced in Maine Superior Court. Summary judgment was entered against Petitioners on the grounds that they failed to raise a genuine issue of material fact with regard to the standard of care applicable to Respondent and Respondent's breach thereof (A. 9-10). This judgment was upheld on the same grounds by the Maine Supreme Judicial Court, (A. 21-22). Petitioners did not raise the Fifth Amendment issue before the Maine Superior Court, (A.2-12) or the Maine Supreme Judicial Court (A. 13-22).

SUMMARY OF THE ARGUMENT

The United States Supreme Court has no jurisdiction over this matter. Petitioners cite the Fifth Amendment as the basis of jurisdiction. This issue was not presented to the state courts below. Furthermore, the Fifth Amendment has no application to this legal malpractice claim, since the Fifth Amendment is a limitation on the federal government and not on private parties.

Certiorari is not a matter of right, but of judicial discretion. Sup.Ct.R. 10.1. Petitioners Bruce W. Jackson and Jeannette L. Jackson petition the Court to review a decision of the Maine Supreme Judicial Court affirming summary judgment in favor of Jim Mitchell and Jed Davis, P.A. on the grounds that Petitioners failed to produce expert testimony in support of their claim against the attorneys for negligence. Petitioners state that this matter is within the jurisdiction of the United States Supreme Court because the Maine Supreme Judicial Court's requirement of expert testimony in their case has deprived them of life, liberty, or property without due process of law, and thus violates the Fifth Amendment of the United States Constitution.

Essentially, Petitioners' argument is that the attorneys' alleged negligence was obvious and within the ordinary knowledge and experience of laymen, and therefore expert testimony as to the standard of care and the attorneys' breach thereof was not necessary to oppose Respondent's motion for summary judgment. The Maine Superior Court,

Penobscot County and the Maine Supreme Judicial Court disagreed. Petitioners are now asking the United States Supreme Court to review the conclusion of law reached by the Maine Superior Court and Maine Supreme Judicial Court.

This matter is not within the jurisdiction of the United States Supreme Court. Any federal question presented in Petitioners' Petition for Writ of Certiorari was not raised in state court proceedings, and therefore the Supreme Court lacks jurisdiction under 28 U.S.C. Section 1257. Furthermore, Petitioners' Petition for Writ of Certiorari does not raise a federal question.

I. ANY FEDERAL QUESTION PRESENTED BY PETITIONERS WAS NOT RAISED IN THE SUMMARY JUDGMENT ACTION IN MAINE SUPERIOR COURT; NOR WAS IT RAISED IN THE APPEAL TO THE MAINE SUPREME JUDICIAL COURT.

Title 28 U.S.C. Section 1257 grants the Supreme Court authority to review, by Writ of

Certiorari, a final judgment of the highest court of the state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. Section 1257(a). This statute requires the federal question raised in the Petition for Writ of Certiorari to have been presented to the state courts. See Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 396 (1981). In this case, Bruce and Jeannette Jackson raise the constitutional issue for the first time in this Petition for Writ of Certiorari. Therefore, the petition must be denied for want of jurisdiction. Id. The policy reasons underlying the statute include federal-state comity, the need for parties to have an opportunity to develop the record necessary for adjudicating the issue, to permit state courts to exercise their authority to construe state law, to allow for identification of independent and adequate state grounds, and to allow state courts an opportunity to

decide dispositive issues which might obviate the need for Supreme Court review. Id. at 399. Respondent had no opportunity to develop evidence regarding the constitutional issue Petitioners now raise for the first time.

II. PETITIONERS HAVE FAILED TO RAISE A FEDERAL QUESTION.

Supreme Court Rule 10 sets forth the character of reasons which will be considered sufficient for the Supreme Court to grant a writ of certiorari. With regard to decisions of a state court of last resort, the Rule states that the Supreme Court will consider granting certiorari when the state court has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. Sup.Ct.R. 10.1(b).

While Petitioners assert the Fifth Amendment as the basis of their Petition are challenging the Maine Supreme Judicial Court's conclusion that the negligence alleged by the Jacksons in their legal

malpractice counterclaim was not obvious or within the ordinary knowledge and experience of laymen: "These facts show an obvious neglect of duty to the Appellants (sic) by the Appellees (sic) and present questions which should be heard by the trier of fact." Petition for Writ of Certiorari, Bruce W. Jackson and Jeannette L. Jackson, Petitioners, p. 19. Petitioners never explain how the Fifth Amendment is implicated by the legal malpractice counterclaim.

The issue Petitioners raise is not a federal question. A federal question requires presentation of a claim under a federal statute or the Federal Constitution. Webb v. Webb, 69 L.Ed.2d at 400. Petitioners merely want review of a state court's application of state law.

Furthermore, the constitutional claim asserted by Petitioners is inappropriate. Petitioners' Fifth Amendment rights cannot have been violated by Jim Mitchell and Jed Davis, P.A., a private entity. The Fifth Amendment is a limitation on the federal

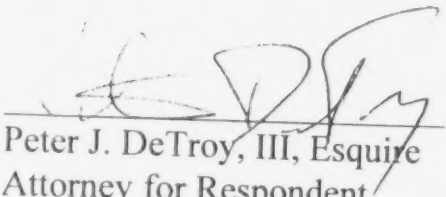
government, and has no reference to state actions. Ex parte Whistler, 65 F.Supp. 40 (D.C.Wisc. 1945), appeal dismissed 154 F.2d 500, cert. denied 327 U.S. 797, 90 L.Ed. 1023, rehearing denied 327 U.S. 819, 90 L.Ed 1041. It likewise has no applicability to a legal malpractice claim against a non-governmental party.

Nor have Petitioners demonstrated a conflict between the way in which the Maine Supreme Judicial Court applied the rule requiring expert testimony in legal malpractice matters, and the manner in which the rule is applied in other state courts of last resort. None of the cases cited by Petitioners suggest that Respondent's withdrawal from representing Petitioners in light of the absence of any credible expert banking testimony to support their claims in the underlying suit, while offering to protect their interests by advising them with regard to proceeding pro se, would have constituted "obvious" malpractice in any other jurisdiction.

CONCLUSION

Petitioners, by this Petition for Writ of Certiorari, are requesting the Supreme Court to reconsider whether the facts found by the Superior Court, and relied upon by the Maine Supreme Judicial Court, fit within one of the exceptions to the requirement of expert testimony in a legal malpractice suit, as set forth in the rule adopted by the Maine Supreme Judicial Court. This is a question of interest only to the individual parties to this matter, and not of importance to the public. See Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923). The United States Supreme Court should decline to review the decision of the Maine Supreme Judicial Court in the matter of Bruce W. and Jeannette L. Jackson v. Jim Mitchell and Jed Davis, P.A.

Dated: 1-7-94



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